1:CV-00-2180

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: MIDDLE DISTRICT OF Pennsylvania	
Name: TERRY POWELL	Prisoner No.: CT-9673	Case No.:

Place of Confinement:
State Correctional Institution at Mahanoy
301 Morea Road, Frackville, PA 17932

Name of Petitioner (include name under which convicted): TERRY POWELL

v.

Name of Respondent (authorized person having custody of petitioner): ROBERT SHANNON

The Attorney General of the State of: PENNSYLVANIA

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Court of Common Pleas-Adams County, Pennsylvania

2. Date of judgment of conviction: May 31, 1995

3. Length of sentence: 5 to 10 years

4. Nature of offense involved (all counts): Robbery and related offenses

FILED
SCRANTON
DEC 14 2000
PER _____ DEPUTY CLERK

5. What was your plea? (Check one)
   (a) Not guilty ☑
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☑
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☑

8. Did you appeal from the judgment of conviction?
   Yes ☑ No ☐

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(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☑ No ☐

(5) Result Denied

(6) Date of result January 11, 1999

(b) As to any second petition, application or motion give the same information:

(1) Name of court None

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☑ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. *State concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may

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For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Denial of rights to fair trial and due process of law- Refusal to allow testimony of defense witness under hearsay exception regarding a declaration against penal interest.

Supporting FACTS (state *briefly* without citing cases or law) Please see memorandum, attached

B. Ground two: Denial of Right to an impartial jury and due process of law.

Supporting FACTS (state *briefly* without citing cases or law): Please see memorandum, attached.

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C. Ground three: The conviction results from a violation of the Fourteenth Amendment-insufficient evidence.

Supporting FACTS (state *briefly* without citing cases or law):

Please see memorandum in support of petition, attached.

D. Ground four Denial of Sixth Amendment Right to Effective Assistance of Counsel and Due Process of Law.

Supporting FACTS (state *briefly* without citing cases or law):

Please see memorandum in support of petition, attached

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

All issues were fairly and fully presented to each level of the state courts.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Anthony Miley, Esquire

(b) At arraignment and plea Daniel Wolfson, Esquire

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(c) At trial Daniel Wolfson, Esquire

(d) At sentencing Robert Chester, Esquire

(e) On appeal Robert Chester, Esquire

(f) In any post-conviction proceeding Garrett D. Page, Esquire

(g) On appeal from any adverse ruling in a post-conviction proceeding Garrett D. Page, Esquire

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: Petitioner did receive three (3) consecutive 5 to 10 year sentences under CC-512-93; 383-93 and 418-93, but all sentences are aggregated under Pennsylvania law for a total of 15 to 30 years.
(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☑

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Terry R. Powell
Signature of Attorney (if any)
pro se

I declare under penalty of perjury that the foregoing is true and correct. Executed on

December 7, 2000
(date)

Terry R. Powell
Signature of Petitioner

AO 240 (Rev. 6/86) Application to Proceed

United States District Court

MIDDLE DISTRICT OF PENNSYLVANIA

TERRY POWELL, Petitioner

v.

ROBERT SHANNON, et al.

Respondents

APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION AND ORDER

CASE NUMBER:

I, Terry Powell, declare that I am the *(check appropriate box)*

☐ petitioner/plaintiff ☐ movant (filing 28 U.S.C. 2255 motion)

☐ respondent/defendant ☐ movant filing 28 U.S.C. §2254 motion

other

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows:

In further support of this application, I answer the following questions.

1. Are you presently employed? Yes ☐ No ☑

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

I am incarcerated, and have been since March 31, 1993. I earn about $23 per month from prison employment.

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

Not applicable

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or other form of self-employment Yes ☐ No ☑

   b. Rent payments, interest or dividends? Yes ☐ No ☑

   c. Pensions, annuities or life insurance payments? Yes ☐ No ☑

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If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings accounts?
Yes ☐ No ☑ (Include any funds in prison accounts.)
If the answer is "yes," state the total value of the items owned.

4. Do you own or have any interest in any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?
Yes ☐ No ☑
If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2000 (Date) Tony R. Russell Signature of Applicant

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant named herein has the sum of $ 23.21 on account to his credit at the SCI/Mahanoy institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: N/A

I further certify that during the last six months the applicant's average balance was $ 25.66

E.A. Russell / Inmate Accounts
Authorized Officer of Institution

ORDER OF COURT

The application is hereby denied

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

8153	06-01-2000	32	MAH COMMISSARY FOR 6/01/2000	-4.88	1.07
7475	06-01-2000	37	POSTAGE 06/01/00	-.22	.85
7496	06-08-2000	10	MAINTENANCE PAYROLL FOR: 5/7-6/3/00 GROUP 1	20.00	20.85
8167	06-15-2000	32	MAH COMMISSARY FOR 6/15/2000	-4.92	15.93
9006	06-15-2000	34	RADIO/TV BASIC ONLY	-13.00	2.93
7533	06-22-2000	13	PERSONAL GIFT FROM POWELL,DEB/E792111	25.00	27.93
8174	06-22-2000	32	MAH COMMISSARY FOR 6/22/2000	-2.86	25.07
7538	06-26-2000	13	PERSONAL GIFT FROM POWELL,ROBERT M/E792179	30.00	55.07
7540	06-27-2000	37	POSTAGE 6/26/00	-.55	54.52
8181	06-29-2000	32	MAH COMMISSARY FOR 6/29/2000	-20.80	33.72
			BALANCE AFTER THESE TRANSACTIONS------>		33.72

PA DEPT. OF CORRECTIONS — INMATE ACCOUNTS SYSTEM — RUN IAS365
BUREAU OF COMPUTER SERVICES — PARTIAL ACCOUNT LISTING — DATE 11/09/2000
REMOTE PRINT TIME 15:39 — FROM ACTIVE FILE — PAGE 1

INMATE NUMBER	NAME LAST	FIRST	MI	STARTING BALANCE
CT9673	POWELL	TERRY	R	33.72

BATCH #	DATE MO DY YEAR		TRANSACTION DESCRIPTION	TRANSACTION AMOUNT	BALANCE AFTER TRANSACTION
7559	07-06-2000	10	MAINTENANCE PAYROLL PP: 06/04-07/01/00 GROUP 1	20.00	53.72
8188	07-06-2000	32	MAH COMMISSARY FOR 7/06/2000	-11.20	42.52
7566	07-07-2000	37	POSTAGE 7/5/00	-.44	42.08
7583	07-12-2000	37	POSTAGE 7/11/00	-3.20	38.88
8195	07-13-2000	32	MAH COMMISSARY FOR 7/13/2000	-15.63	23.25
8202	07-20-2000	32	MAH COMMISSARY FOR 7/20/2000	-7.06	16.19
9007	07-20-2000	34	RADIO/TV BASIC ONLY	-13.00	3.19
7602	07-24-2000	13	PERSONAL GIFT FROM DEB POWELL E772589	20.00	23.19
8208	07-26-2000	32	MAH COMMISSARY FOR 7/26/2000	-7.23	15.96
7620	07-28-2000	14	MISCELLANEOUS MAILROOM ERROR-REFUND-072600	3.20	19.16
8215	08-02-2000	32	MAH COMMISSARY FOR 8/02/2000	-8.60	10.56
7637	08-04-2000	12	BONUS PAYROLL SOFTBALL SPORTSMANSHIP AWARD	8.00	18.56
7638	08-04-2000	37	POSTAGE 8/3/00 CHARGES	-.44	18.12
7639	08-07-2000	13	PERSONAL GIFT FROM POWELL,DEB E681707	25.00	43.12
7651	08-10-2000	10	MAINTENANCE PAYROLL PP: 07/02-08/05/2000 GROUP 1	26.00	69.12
8223	08-10-2000	32	MAH COMMISSARY FOR 8/10/2000	-2.90	66.22
7653	08-11-2000	13	PERSONAL GIFT FROM DOHLING,M/E925608	10.00	76.22
8230	08-17-2000	32	MAH COMMISSARY FOR 8/17/2000	-20.82	55.40
9008	08-17-2000	34	RADIO/TV BASIC ONLY	-13.00	42.40
8237	08-24-2000	32	MAH COMMISSARY FOR 8/25/2000	-10.12	32.28
8244	08-31-2000	32	MAH COMMISSARY FOR 8/31/2000	-10.74	21.54
7701	09-01-2000	37	POSTAGE 8/30/00	-.44	21.10

PA DEPT. OF CORRECTIONS — INMATE ACCOUNTS SYSTEM — RUN IAS365
BUREAU OF COMPUTER SERVICES — PARTIAL ACCOUNT LISTING — DATE 11/09/2000
REMOTE PRINT TIME 15:39 — FROM ACTIVE FILE — PAGE 2

INMATE NUMBER	NAME LAST	FIRST	MI
CT9673	POWELL	TERRY	R

BATCH #	DATE MO DY YEAR	TRANSACTION DESCRIPTION	TRANSACTION AMOUNT	BALANCE AFTER TRANSACTION
7701	09-01-2000 37	POSTAGE 8/31/00	-.88	20.22
7711	09-07-2000 10	MAINTENANCE PAYROLL FOR: 8/6-9/2/00 GROUP 1	21.80	42.02
8251	09-07-2000 32	MAH COMMISSARY FOR 9/07/2000	-7.00	35.02
7725	09-12-2000 44	ORGANIZATIONAL RBO SNACK CAKE SALE - 9/28/00	-2.60	32.42
7685	09-12-2000 41	MEDICAL INMATE MEDICAL CHARGE 9/7/00	-2.00	30.42
8257	09-13-2000 32	MAH COMMISSARY FOR 9/13/2000	-15.51	14.91
7733	09-15-2000 13	PERSONAL GIFT FROM POWELL,ROBERT/E710871	40.00	54.91
7748	09-19-2000 44	ORGANIZATIONAL RBO BB/BS-RUNATHON 09/2000	-1.00	53.91
9009	09-21-2000 34	RADIO/TV BASIC ONLY	-13.00	40.91
8265	09-21-2000 32	MAH COMMISSARY FOR 9/22/2000	-8.53	32.38
7764	09-27-2000 13	PERSONAL GIFT FROM POWELL,DEB/E771515	25.00	57.38
8272	09-28-2000 32	MAH COMMISSARY FOR 9/28/2000	-12.20	45.18
7777	10-04-2000 31	OUTSIDE PURCHASES JLM/AVIAS/092500	-32.75	12.43
8279	10-05-2000 32	MAH COMMISSARY FOR 10/05/2000	-6.54	5.89
7780	10-06-2000 41	MEDICAL INMATE MEDICAL CHARGE 10/3/00	-4.00	1.89
7785	10-06-2000 37	POSTAGE 10/5/00	-.44	1.45
7795	10-12-2000 10	MAINTENANCE PAYROLL GROUP 1 9/3/00 - 10/7/00	26.01	27.46
8286	10-12-2000 32	MAH COMMISSARY FOR 10/13/2000	-1.20	26.26
8293	10-19-2000 32	MAH COMMISSARY FOR 10/19/2000	-6.51	19.75
9010	10-19-2000 34	RADIO/TV BASIC ONLY	-13.00	6.75
7780	10-24-2000 14	MISCELLANEOUS RFND/INMATE MEDICAL 10/12/00	4.00	10.75
7831	10-25-2000 37	POSTAGE 10/24/00	-.22	10.53

PA DEPT. OF CORRECTIONS — INMATE ACCOUNTS SYSTEM — RUN IAS365
BUREAU OF COMPUTER SERVICES — PARTIAL ACCOUNT LISTING — DATE 11/09/2000
REMOTE PRINT TIME 15:39 — FROM ACTIVE FILE — PAGE 3

INMATE NUMBER	NAME LAST	FIRST	MI
CT9673	POWELL	TERRY	R

BATCH #	DATE MO DY YEAR		TRANSACTION DESCRIPTION	TRANSACTION AMOUNT	BALANCE AFTER TRANSACTION
8300	10-26-2000	32	MAH COMMISSARY FOR 10/26/2000	-5.79	4.74
8307	11-02-2000	32	MAH COMMISSARY FOR 11/02/2000	-4.31	.43
7856	11-03-2000	37	POSTAGE 11/02/00	-.22	.21
7868	11-09-2000	10	MAINTENANCE PAYROLL FOR: 10/8-11/4/00 GROUP 1	23.00	23.21
			BALANCE AFTER THESE TRANSACTIONS------>		23.21

HISTORY OF CASE

On March 27, 1993, Ms. Shelby Greenwalt was working as a night clerk at the Holiday Inn Express Motel, located in Straban Township, Adams County, Pennsylvania. At 2:30 a.m. a white male entered wearing sunglasses and a gray hooded sweatshirt. N.T. 12/08/94, p. 40-41. The robber brandished a handgun and demanded money. Id. During the search for the perpetrator, Ms. Greenwalt was shown two individual photo arrays, both arrays consisting of, among seven others, photos of the petitioner, Powell. These arrays were shown to Ms. Greenwalt one day following the robbery. While viewing the first photo array, consisting of a photo taken of Powell in 1984 (Id. 62), approximately ten years prior to the robbery, Ms. Greenwalt stated that both Daniel Moody and Terry Powell looked similar to the man who robbed her (Id. 63).

Upon viewing a second photo array, which consisted of a much more recent photo of Powell (1988 photo Id. 63), and omitted any photos of Moody, Ms. Greenwalt could not identify anyone. Id. 64.

Ms. Greenwalt then returned to photo array number one, and after a thorough examination, stated that Moody looked most like the man who robbed her. Id. 78.

Moody was subsequently arrested based upon the above photograph identification by Ms. Greenwalt (Id. 80), as well as other evidence accumulated by the arresting officer, Corporal Ivan Taylor. Id. 68. Moody promptly confessed and implicated petitioner. Id. 80.

Petitioner was arrested on April 20, 1993, charged with robbery and related offenses at CC-418-93. A preliminary hearing was held on that same date. Trial originally commenced on September 16, 1994, before the Honorable Oscar F. Spicer and a jury. Petitioner was represented by Daniel Wolfson, Esquire, while the Commonwealth was represented by Martha Duvall, Esquire. The jury adjudged Petitioner guilty of all charges on December 8, 1994.

Post-verdict motions were heard on February 27, 1995, including allegations of ineffective assistance of trial counsel. The post-verdict motion was denied on May 4, 1995. On May 31, 1995, Petitioner was sentenced to a consecutive term of 5 to 10 years incarceration (Petitioner also receive consecutive terms of 5-10 years at CC-512-93 and CC-383-93, for a total aggregated 15-30 year sentence).

An appeal from judgment of sentence was perfected to the Superior Court of Pennsylvania, and affirmed. Commonwealth v. Powell, 688 A.2d 1230 (Table), reargument denied, ibid, Allocatur denied, 698 A.2d 66 (Pa. 1997). Petitioner next filed for relief under the Post Conviction Relief Act, 42 Pa. C.S.A. § 9541, et seq. That petition was denied. An appeal to the Superior Court was affirmed, 745 A.2d 45 (Table), Allocatur denied, 747 A.2d 899 (12/14/99).

§ Constitutional Violations

¶ 1. Petitioner's conviction results from a violation of the Sixth and Fourteenth Amendments to the United States Constitution:
Rights to a fair trial and due process of law.

At trial, Petitioner sought to introduce testimony from Brad Sneeringer regarding a statement against penal interest (confession) made to him by Timothy Moody, in this case. N.T. 12/08/94, p. 82. Mr. Sneeringer was present in the courtroom and ready to testify. Id.

For purposes of clarification - the Commonwealth's case rests entirely upon the in-court identification of Petitioner by Ms. Greenwalt as the robber. Ms. Greenwalt's testimony will be discussed, infra, and shown to be doubtful. Moreover, Ms. Greenwalt initially identified Moody from a photograph array (Id. P. 45), and that served as the basis for Moody's arrest. Moody, in turn, gave a confession which implicated Petitioner in the robbery. See, Opinion of Court, 05/04/95, p. 12. Subsequently, in July or August of 1993, Moody

confessed to Sneeringer that he alone had committed the robbery. Additionally, Moody related details which could only have been known by the robber; such as the disguise, and his intentional slurring of speech. N.T. 12/08/94, p. 82.

Here, Petitioner contends that the trial court abrogated clearly established Federal law in denying his request to present the testimony of Sneeringer regarding Moody's declaration against penal interest.

¶ 2. Petitioner's conviction results from a violation of the Sixth and Fourteenth Amendments to the United States Constitution:

Rights to an impartial jury and due process of law.

During the jury selection the court asked the following question and received the following response:

> "[The Court] Are any of you folks related by blood or by marriage or do you know any of the people I've mentioned more than just casually? If so, may I see a hand? Your number is?
>
> [Juror 18 & 70 raised their hand].
>
> [The Court] With whom please are you acquainted?
>
> [Juror] I know Terry.
>
> [The Court] And.
>
> [Juror] I know of him too.
>
> [The Court] Do you feel that your personal acquaintance with Mr. Powell would make it difficult or impossible for you to be fair and impartial in this case?
>
> [Juror] Yes, Sir.
>
> [The Court] Both of you or just one?
>
> [Juror] I used to be a prison guard so I know him in that aspect."

N.T. 12/05/94, p. 5-6.

The two jurors' responses were made in the presence and hearing of the entire venire, including the thirteen jurors that were ultimately chosen.

No cautionary instruction was provided, at any time during the trial, which might have dissipated the taint created by the jurors' comments, above. Specifically, the jurors' comments had the following effect:

(1) Conveyance of an impression that Petitioner was a man of ill-repute, undeserving of fair and impartial consideration.

(2) Conveyance of the fact that Petitioner was imprisoned for this or other crimes.

Thus, while it can be logically said that negative inferences were created by the comments, there is no sure way of ascribing weight or impact to the comments. This is because no voir dire occurred as to the remaining jurors.

Here, Petitioner contends that the jurors' responses infected the entire venire, creating a fixed bias or hostility such that it denied a fair trial.

¶ 3. Petitioner's conviction results from a violation of the Fourteenth Amendment to the United States Constitution:

Insufficient evidence.

Simply stated, the testimony supplied by Shelby Greenwalt is incredulous at best. It is argued that Ms. Greenwalt's trial testimony represents a zealousness to identify and convict. In the beginning, Ms. Greenwalt identified Timothy Moody as the person who "[l]ooked most like the person who robbed her." N.T. 12/08/94, p. 67.

Some time after, Ms. Greenwalt saw a photo of Petitioner and read about Petitioner's arrest in the local newspaper. N.T. 04/20/93, p. 9. (Those news articles showed a photo of Petitioner and identified him as the "sweatshirt bandit.") Still unsure of her identification, Ms. Greenwalt took the initiative at a preliminary hearing to casually enter the courtroom (presumably by the direction of arresting officers, creating an illegal in-court identification, and unbeknownst to any of the parties), and reassure herself that Petitioner

was the perpetrator. Id. p. 15-16. (It must also be noted that Petitioner appeared at that time in prison garb, handcuffs, and shackles, and in the custody of law enforcement; and that procedure had no resemblance to a lineup and was presumably impermissibly suggestive.) It was at the preliminary hearing almost two months later that Ms. Greenwalt positively identified Petitioner, and not Moody, as the person who robbed her. Id. p. 35, also, N.T. 12/08/94, p. 69.

Various snippets of Ms. Greenwalt's testimony further explains why her testimony was so problematic. She conceded that the robber wore an effective disguise: "[Question] [W]ere you able to get a good look at him?" "[Answer] "[A]s good as I could the way he was covered." N.T. 04/20/93, p. 5. She was certain that the robber had a speech impediment; something of a slur or lisp. Id. p. 14. Ms. Greenwalt initially stated that the robber had brown eyes (N.T. 09/16/94, p. 36), whereas Petitioner's eyes are strikingly blue! Ms. Greenwalt again later contradicted her statement and stated that the robber actually wore sunglasses. (By way of further explanation, the "brown eyes" description comes from the mistrial but was not repeated at the trial. N.T. 12/08/94, pp. 43, 54-56) Finally, Ms. Greenwalt did what may overzealous, but well-meaning eyewitnesses tend to do. She attempted to specifically describe the gun used ("35 mm handle" N.T. 04/20/93, p. 4), when she clearly had no basis or knowledge for doing so.

¶ 4. Petitioner's conviction results from a violation of the Sixth and Fourteenth Amendments to the United States Constitution:

Rights to effective assistance of counsel.

Trial counsel rendered ineffective assistance by his failure to use a tape recording of Ms. Greenwalt's preliminary hearing testimony for impeachment purposes.

It is emphasized that petitioner's robbery conviction rests solely upon the in-court identification testimony of Ms. Shelby Greenwalt. It is hornbook law that "[I]n a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of defendant, the failure to explore all alternatives available to assure that the jury hears the testimony of a known witness who might be capable of casting a shadow on the Commonwealth's witness' truthfulness is ineffective assistance of counsel. Commonwealth v. Twiggs, 331 A.2d 440, 443 (Pa. 1975). Following this line of reasoning, ineffectiveness is also shown where trial counsel has available impeachment evidence, but fails to use it whether the explanation be oversight or inadvertence. Commonwealth v. Bolden, 543 A.2d 456, 459 (Pa. 1987), Commonwealth v. Abney, 350 A.2d 407, 409 (Pa. 1976).

At trial, during cross-examination, Ms. Greenwalt was asked directly about her testimony at a preliminary hearing that she did not get a good look at the robber the way he was covered or "[a]s good as I could the way he was covered." (N.T. 12/18/94, p. 49-50). Ms. Greenwalt expressly denied making the statement. (Id.) This was critical to the defense case because the evidence showed the bandit wore a significant if not elaborate ourfit to disguise or conceal his identity. Later in the trial, counsel framed the issue of Ms. Greenwalt's prior inconsistent testimony (preliminary hearing), for the court to rule upon. The court ruled that counsel would be permitted to re-open cross-examination of Ms. Greenwalt to confront her with the prior inconsistent statement. (Id. pp. 73-75).

Development of this issue: impeachment by use of prior inconsistent statement(s) made at a preliminary hearing, worked its way through the state courts by collateral motion and appeal. There, the state courts held that trial counsel's decision to forego impeachment of Ms. Greenwalt was reasonable

strategy based upon a contention that the most useful portions of the preliminary hearing tape were inaudible. Petitioner strongly disagrees.

First, Petitioner and trial counsel listened to the preliminary hearing tape recording after a mistrial in the same case. Moreover, the preliminary hearing tape was subsequently transcribed for the record. (**Note: Petitioner has enclosed a copy of the transcription of this tape, marked exhibit A, which further supports the tape's auditory nature**). After reviewing the tape, both Petitioner and trial counsel agreed that should Ms. Greenwalt repeat her inconsistent testimony in a re-trial, the tape recording would be used. Thus, it has been petitioner's averment, all along, that he listened to the tape recording and the pertinent part of it is audible and understandable. Second, trial counsel apparently misspoke or perjured himself in post-trial proceedings where he averred the basis for not using the tape recording was it's inaudibility. It was midway through trial when counsel pledged to the court:

> "She said -- I have the statement in my notes. She said something that the way he was dressed I could hardly identify him. She made that statement at the preliminary hearing. I asked her about that statement in Court today and she said she never made that statement."

(Id. p. 74) (emphasis supplied).

Given the fact that trial counsel was not at the preliminary hearing (Id. p. 73), and did not make the recording (Id. p. 74-75), it begs to question: How or on what basis was trial counsel's "notes" developed? Did trial counsel simply manufacture the prior inconsistent statement of Ms. Greenwalt? Not Likely!

§ 2254 (b), (c): Exhaustion of Remedies

Petitioner has fully and fairly presented the issues to each level of the state courts. There is no right under the laws of Pennsylvania to raise

by any procedure the issues presented.

§ 2254 (d): Decision Contrary to Federal Law

¶ 1. The genesis for Petitioner's due process claim is found in the Sixth and Fourteenth Amendments, as pronounced in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973). In Chambers, the court stated that in certain cases a failure to admit statements against interests as an exception to the hearsay rule can result in a denial of the right to a fair trial for the defense. Here, defense counsel made the offer of proof to the trial court.

> "Mr. Sneeringer will testify that in July or August of 1993, he had occasion to come in contact with Timothy Daniel Moody and at that conversation Mr. Moody indicated to Mr. Sneeringer that he had in fact robbed the Holiday Inn Express, the incident in question, that pursuant to that robbery he was dressed in a sweatshirt with a hood and that he indicates that whenever he robbed places like this he disguised his speech or slurred his speech. That's the testimony Mr. Sneeringer will give."

N.T. 12/08/94, p. 82-90 at 82.

Here, Moody was an unavailable declarant, since he stated to Assistant District Attorney Duvall that he would take the Fifth Amendment and refuse to testify if subpoenaed by her for trial. Neither the sheriff's department nor the prosecutor could find him for the second robbery trial. By way of further explanation, Moody testified at a post-verdict hearing that he was contacted by A.D.A. Duvall just two days prior to the trial. N.T. 02/27/95, p. 29-30. Further, Moody stated his intention to be a defense witness, but changed course after Ms. Duvall stated "[t]hat she had a subpoena for me that I had to come pick up and that she intended to use me as a witness in a case against Mr. Powell...and then she told me about granting me full immunity and that I would have to testify against Mr. Powell. Id. p. 30.

Notwithstanding Ms. Duvall's tampering with a defense witness, or the digression which occurred during in-camera discussion (N.T. 12/08/94, p. 82-90),

Petitioner contended all along that he intended to call Moody as a defense witness, and allow the chips to fall as they may. That is his Sixth Amendment Right. The prosecutor's legerdemain actually led to Moody being unavailable a fortiori the Sneeringer testimony should have been permitted. Here, the court ruled that because Sneeringer was not a policeman, then the declaration made to him was inadmissible.

> "I think it comes down to the declarant's perception that he may be arrested and prosecuted on the basis of the statement made. I doubt that very may declarants who talk to a prisoner in a prison will think that the statement will be taken seriously enough to warrant prosecution. That's certainly a little different than talking to a policeman."

Id. p. 90.

Not only is the ruling contrary to Chambers, but it simply does not wash. Such reasoning belies the daily instance where "jailhouse snitches" are permitted to testify as prosecution witnesses, or even when undercover policeman are inserted into a prison setting to elicit confessions. See, e.g. Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (Pa. 1992) (citing various cases). The appropriate constitutional standard is to determine whether the statement was sufficiently against penal interest by viewing it in light of all the surrounding circumstances. U.S. v. Moses, 148 F.3d 277 (3d Cir. 1998). There is no per se rule disfavoring such statements. Id. Thus, the trial court's ruling runs afoul of the Constitution, by ruling that reliability turns upon the fact of whether the witness was a policeman.

¶ **2.** In essence, the right to jury trial guarantees Petitioner a fair trial by a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961). The question of an individual juror's partiality is one of historical fact. Patton v. Yount, 467 U.S. 1025, 1036, 104 S.Ct.

2885, 2891 (1984). The standard of review for Petitioner's claim is manifest error. Mu'min v. Virginia, 500 U.S. 415, 428, 111 S.Ct. 1899, 1907 (1991).

Here, Petitioner complains that the juror revelation that he had been in prison, generally, created a permanent and lasting prejudice in the remaining jurors. No additional voir dire concerning the prison guard comment was conducted, and no curative measure was undertaken. It must also be noted that this same kind of revelation caused the previous mistrial. See, N.T. 09/16/94, p. 50.

In state court proceedings, Petitioner assigned this error to ineffective assistance of counsel. See, Brief of Appellant, No. 525 & 526 Hbg 1995, ¶ VIII. In the instant federal petition, the same complaint is assigned to counsel as the reason for Petitioner's failure to contemporaneously object. See, Murray v. Carrier, 477 U.S. 478, 488-89, 106 S.Ct. 2639, 2645-46 (1986) (Ineffective assistance of counsel is cause for procedural default so long as it is presented as independent claim and exhausted in state court.)

¶ 3. Federal district courts are obligated to review state court convictions to determine, whether or not, the criminal conviction is supported by sufficient evidence. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). Where evidence offered to support the verdict contradicts physical facts, or contravenes human experience and the laws of nature, then the evidence is insufficient as a matter of law. See, Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. Super. 2000).

In Petitioner's case, the conviction rests solely upon the trial identification by Ms. Greenwalt. Ms. Greenwalt admitted to one misidentification involving a photograph array. (Opinion, 05/04/95, p. 8), and failed to identify during a second photograph array. Her uncertainty was further demonstrated by her act of sneaking a peek at Petitioner and his co-defendant

prior to the start of the preliminary hearing. Then, there is the inconsistency over brown eye versus blue eyes of the perpetrator. N.T. 09/16/94, p. 36. Given the discrepancies, above, one might wonder just how did the jurors reconcile them.

Petitioner contends the answer to the question is found in the trial Judges's instruction on the subject of Ms. Greenwalt's testimony.

> "I might say, members of the panel, just so you understand why certain things were done and how you should view them, the prior identification of the defendant at the preliminary hearing, the prior viewing of the Defendant's photograph are only in this case for you to determine the weight and effect of her in-court identification. **It is the in-court identification that is important and which must be the basis for a verdict of guilty.** You can only find the defendant guilty in this particular case if you believe Miss Greenwalt's in-court identification. In determining whether or not you believe it and believe it beyond a reasonable doubt, then you would consider the background of the case starting from the incident at the Holiday Inn Express and including the photographic array. I think there were two of them and the confrontation that occurred at the preliminary hearing and and at the risk of making you all very fidgety, I want to repeat that it is the Commonwealth's burden of proving the defendant guilty. They must prove that it was he who committed these crimes at the Holiday Inn Express, if you find that the crimes were committed, and in order to do that, you must believe Miss Greenwalt's in-court testimony."

N.T. 12/08/94, p. 127-128 (emphasis supplied).

Here, the judge did not use language such as "prior misidentification", or "prior failure to identify"; what he did was to make the language as benign as possible and still comport with requirements. Given the events and testimony described above, the district court should grant relief. See, Evans-Smith v. Taylor, 19 F.3d 899, 909-910, (4th Cir.), Fagan v. Washington, 942 F.2d 1155, 1158 (7th Cir. 1991).

¶ **4.** Fundamentally, Petitioner's argument is controlled by Strickland v. Washington, 466 U.S. 668 (1984). More specifically, the district court may look to a decision from this circuit for amplification of the Strickland

guidelines. See, Matteo v. Superintendent, 171 F.3d 877 (3d Cir. 1999). In United States v. Baynes, 687 F.2d 659 (3d Cir. 1982), the question of counsel's performance turned on whether or not it was reasonable for counsel to have failed to listen to and compare the government's tape-recorded conversations of defendant with a voice exemplar of defendant's true voice. A new trial was granted, notwithstanding counter-arguments that post-trial testimony identified defendant Baynes' voice as that on the incriminating recording. (Id. at 671). In passing upon the prejudice component of Strickland, supra, the Court stated:

> "Given that the intercepted tape was the only evidence offered against Trice during the course of a nineteen day trial, it it is not difficult to envision how an effective trial counsel might have exploited the exemplar evidence to great effect in order to advance his client's cause. While we cannot say with any certainty that, as a result of such a performance, Trice would have been acquitted, that is not the test. All we need determine is that Trice's defense was prejudiced by his counsel's ineffectiveness-i.e., that the exemplar evidence, if investigated, might have led to a viable defense and a favorable verdict, and that the failure of Trice's attorney to so proceed is not harmless beyond a reasonable doubt."

Baynes, supra, at 673 (emphasis and citations in original omitted.)

Here, the same reasoning prevails. Where the only evidence against petitioner was the identification testimony of Ms. Greenwalt, it is not difficult to envision a strengthening of Petitioner's defense if trial counsel had confronted Ms. Greenwalt with her preliminary hearing testimony, as described above, and shown that she did, in fact, so testify, and at trial attempted to deny. Given the other allegations regarding Ms. Greenwalt's identification, infra, Petitioner's issue is emboldened. See also, Williams v. Taylor, 120 S.Ct. 1495 (U.S. 2000) ("Strickland" provides sufficient guidance for resolving virtually all ineffective assistance claims.)

§ 2254(e)(1): Presumption of Correctness of Facts

The trial court opinion represents the state court findings on Petitioner's claims. In each instance the Superior Court concurred with the findings of the trial court. Here, the trial court ruled that Petitioner's ineffective assistance complaint lacked merit. See, Opinion, May 4, 1995, pp. 5, 7. With regard to the exclusion of defense witness Brad Sneeringer, the trial court ruling is based upon state decisional law (Id., p. 10-12), and speculation about "prejudice." In sum, the court seemed concerned that, "[H]ad the jail house confession been admitted, the police confession would have been admissible to impeach it." Id. p. 8. Was not this a decision to be made by the defense as part of it's trial strategy? It is simply not appropriate for the court to deny Petitioner his Sixth Amendment right because the court believes the defense strategy to be unwise. See, Opinion, 05/04/95, p. 12. With regard to the sufficiency of evidence claim, the trial court found Ms. Greewalt's in-court testimony as positive and unequivocal. Id. p. 8. Thus, the ruling is implied. With regard to the ineffective assistance of counsel claim, the trial court relied upon errant and perjured testimony proffered at post-trial proceedings where trial counsel alleged the tape to be inaudible. A fact which in itself is contradicted by the enclosed transcription of the tape and testimony given by trial counsel himself at trial. Id. p. 73-75. Trial court found that counsel's cross-examination concentrated on prior failures to identify, and that counsel's failure to present the tape for impeachment purposes was, "simply a choice in style or strategy and was not unreasonable." This opinion is a contradiction in itself; in that had trial counsel's cross-examination concentrated on prior failures to identify, and the Commonwealth's case rested solely upon the identification of Ms. Greenwalt, where would the

strategy be in failing to present evidence which impeached the identification testimony of Ms. Greenwalt? Again, it is simply not appropriate for the court to deny Petitioner his Sixth Amendment right merely because of an alleged strategy or choice that belies its own purpose. See, Opinion 05/04/95, p. 10.

¶ 1. Petitioner argued his first claim in both state and federal contexts. He specifically cited the Chambers precedent. In disposing of the claim, the state court appears to have rested its decision on stated decisional law, ignoring the federal precedent. The claim involves a mixed question of law and fact, see Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445 (1985), which entitles the states factual findings to deference regarding the facts, but no such deference on the legal question. Simmons v. Beyer, 44 F.3d 1160, 1166 (3d Cir. 1995) (Petitioner is entitled to have federal constitutional claim determined by district court without being bound by determination of state court regarding analogous merits of state constitutional claim.)

¶ 2. Circuit courts have split on the question of how much force should be accorded to the statutory presumption of correctness regarding a juror bias claim. In some cases the courts simply look to the record to ascertain whether the jurors swore to act impartially. But, Patton suggests that such an approach is reserved for circumstances when an individual juror is the subject of review. See, Patton, supra, at 467 U.S. 1036, 104 S.Ct. 2891. When a prejudicial event occurs which might affect the entire panel, Patton suggests that something more should be done. Id. (distinguishing between the jury as a whole versus an individual juror), See also, Dyer v. Calderon, 151 F.3d 970, 975 (9th Cir. 1997) (Trial court should conduct further examination in order to warrant presumption of correctness of its findings.)

¶ 3. "[A] federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court." Jackson v. Virginia, supra at 318, 99 S.Ct. 2788. The writ of habeas corpus is available to Petitioner, who seeks de novo review of the propriety of his state conviction on a ground of insufficient evidence. Id. 320-321, 99 S.Ct. 2790. "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. 319, 99 S.Ct. 2789.

In Jackson, the court contemplated the rare occasion when "[a] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt...." Jackson, supra, at 317, 99 S.Ct. 2788. There, the reference to a "properly instructed jury" involved language about reasonable doubt; but, a similar paradigm is found in Petitioner's case. That's because, here, the trial judge supplied Petitioner's jury with a charge that was unnecessarily generous to the prosecution.

"It is the in-court identification that is important and which must be the basis for a verdict of guilty."

Even though the imperfect phrase was a brief part of a lengthy jury charge, the court must consider what the reasonable juror would have understood it to mean. See, Yates b. Evatt, 500 U.S. 391, 111 S.Ct. 1884, 1892 (1991). Here, the Commonwealth's entire case rested solely on the identification by Ms. Greenwalt, which was riddled with inconsistency. It cannot be said that the language of the jury charge, above, did not contribute to this verdict. Without it Petitioner believes that any rational jury would have found the evidence lacking.

¶ **4.** In Petitioner's case, the state courts ruled that trial counsel was not ineffective because he made a reasoned judgment based upon counsel's post-conviction testimony that the Preliminary Hearing audio tape was not audible. The AEDPA permits habeas relief if the state court judgment "[r]esulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C.A. § 2254 (d)(2). Stated another way, Petitioner can overcome the presumption of correctness by a showing that the court's findings are not fairly supported by the record. See, e.g. Meyers v. Gillis, 142 F.3d 664, 667 (3d Cir. 1998).

In Petitioner's case, he has attached a copy of the transcribed Preliminary Hearing testimony to his petition (marked exhibit A). This transcript was in trial counsel's possession during the trial; its very existence obviates trial counsel's collateral testimony that the audio tape was not audible! Ergo, the court's ruling from collateral proceedings is not entitled to the standard of deference that is normally accorded by a district court.

The codified presumption of correctness does not apply to mixed questions of law and fact; precisely what a Sixth Amendment ineffective assistance of counsel claim entails. Strickland v. Washington, 466 U.S. at 698. See also, Rock v. Zimmerman, 586 F. Supp. 1076 (M.D. Pa. 1984). Here, the state court did not make an attempt to enshroud it's ruling on legal grounds, such as harmless error. But cf. Deputy v. Taylor, 19 F.3d 1485, 1496 (3d. Cir. 1994). The post-conviction court denied relief on the ineffectiveness claim for a singular reason. And, Petitioner has shown that reason to be flat-out wrong. Accordingly, the post-conviction judgment in this case is not

entitled to any deference.

The attached transcript and testimony proffered by counsel at trial, demonstrates that counsel could have effectively impeached the credibility of Ms. Greenwalt. By his own admissions at trial, counsel indicates that it was clearly his intent to present this tape for purposes of impeachment. In turn, the court provided counsel with the opportunity to re-open cross-examination of Ms. Greenwalt. However, by counsel's failure to present this evidence, it clearly shows that he was ill-prepared to do so. The complete factual context clearly shows that counsel's acts were not based on strategy, choice, or any conscious decision. Counsel's failure was based on oversight.

In disposing of this claim, the state court rested its decision upon testimony proffered by trial counsel during post-conviction proceedings, ignoring the factual record. The state court overlooks or misapprehends facts of record material in relying upon the testimony of trial counsel, thus contravening the record.

The Sixth Amendment guarantees the right to effective assistance of counsel. Trial counsel's performance fell way below an objective standard of reasonableness in his failure to present impeaching identification testimony, particularly here, where the Commonwealth's case rested solely upon Ms. Greenwalt's in-court identification testimony. Trial counsel's deficient performance certainly prejudiced petitioner resulting in an unreliable or fundamentally unfair outcome at trial.

§ 2254 (e)(2): Evidentiary Hearing

A decision whether or not to hold an evidentiary hearing is discretionary. Rules Governing Section 2254 Cases, 8. Here, Petitioner

makes no request for a hearing at this time.

§ 2254 (f): Production of the Record

Petitioner has challenged the sufficiency of the evidence in the state court proceedings relative to the state court's determination of factual issues. Petitioner has also requested to proceed in forma pauperis. Accordingly, the federal court should direct the Respondent to furnish the pertinent parts of the record, including: (1) Preliminary hearing, April 20, 1993, (2) Mistrial, September 16, 1994, Trial, December 5th, 8th, 1994, Post-verdict motions, February 27, 1995, Opinion of court, May 4, 1995.

Respectfully submitted,

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